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No. 00-1397

Supreme Court, U.S.
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In the Supreme Court of the United States

UAL CORPORATION, DBA UNITED AIRLINES,

Petitioner,

v.

JOANNE FIELDER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent's brief, although captioned a brief in opposition, is in substance an acquiescence in the petition for a writ of certiorari. Most notably, respondent concedes that a deep and longstanding conflict exists among the lower courts regarding the application of the continuing violation exception to Title VII's limitations period. Br. in Opp. 8, 23-25. If anything, respondent seems to labor to show that the conflict is even deeper, and the issue even more important, than the petition contends. Perhaps so. Certainly the decisions of the last three months, since the petition was filed, reaffirm that this acknowledged circuit conflict cries out for this Court's resolution.

Respondent does take issue with certain aspects of our description of the record, with our framing of the issues, and with our contentions on the merits. None of those disagreements, however, warrants – nor is it clear that respondent even seriously contends that any of them warrants – denial of certiorari.

1. The circuit split over the proper application of the continuing violation doctrine in discrimination cases can be expected to persist until this Court resolves it. In the short period since the Ninth Circuit decided this case, it has reaffirmed its "related closely enough" test in *Morgan* v. *National R.R. Passenger Corp.*, 232 F.3d 1008 (9th Cir. 2000), cert. pending, No. 00-1614, and again in *McGough* v. *Lockheed Martin*, 2001 WL 275007 (9th Cir. Mar. 20, 2001) (unpublished). Since the petition was filed, other circuits have continued to apply alternative tests that are fundamentally inconsistent with the Ninth Circuit's approach. See, *e.g.*, *Hipp* v. *Liberty Nat'l Life Ins. Co.*, ___ F.3d ___, 2001 WL 575489, at *8 (11th Cir. May 29, 2001) (applying *Berry* v. *Board of Supervisors*, 715 F.2d 971 (5th Cir. 1983)); *Davis* v. *Lucent Tech., Inc.*, ___ F.3d ___, 2001 WL 563780 (1st Cir. May 30, 2001) (applying the notice rule).[1]

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[1] In *Fitzgerald* v. *Henderson*, ___ F.3d ___, 2001 WL 588961 (2d Cir. May 31, 2001), the court considered the Title VII claims of a woman who

There is no doubt that the proper application of the continuing violation doctrine is an issue that arises with tremendous frequency in federal employment litigation. The lower courts have issued more than 50 decisions involving this issue in the past three months alone. Finally, there is no dispute that the question presented is an important one that affects millions of employees and employers and that affects the resources of state and federal fair employment agencies.

2. Although respondent concedes the certworthiness of the question presented, she nevertheless levies three challenges to the petition that merit a brief response. First, respondent contends that the petition misstates portions of the record below. Br. in Opp. 3-7. Second, she argues that the petition should be denied (or an order entered to brief additional issues) because the petition fails to "present the range of necessary questions for proper review." *Id.* at 30. Third, respondent argues that the Court should deny review because the decision below was correct. *Id.* at 8-25. None of those contentions warrants denial of the petition.

a. The brief in opposition purports to correct two misstatements of the record in the introductory section of the petition, neither of which is claimed to have any bearing on the substantive issues raised by the petition. In particular, respondent asserts that, contrary to the petition, she does not seek relief for sexual harassment incidents that occurred before February 15, 1993; instead, evidence regarding those early events was included in the record only as background evidence. Br. in Opp. 3-4. But the court of appeals understood respondent to be argu-

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experienced unwanted sexual overtures from her supervisor on a daily basis for nearly a year, followed by approximately two years of hostile treatment from the same supervisor when she spurned his advances. At the end of that two-year period, the plaintiff took an extended leave of absence and filed an administrative charge of discrimination. The Second Circuit held that the plaintiff could seek relief under a continuing violation theory for the instances of hostile treatment antedating the limitations period because of their frequency and their similarity to the timely incidents of unfair treatment. However, the court held that the unwanted sexual overtures were time-barred because they were not the subject of a timely charge and because they were qualitatively different from the supervisor's retaliatory behavior.

ing that "she is permitted to sue for previous acts of discrimination, not just for those that fell within the limitations period, because the conduct prior to July 14, 1994 was sufficiently related to subsequent events." Pet. App. 17a.[2] It is undisputed that all of the alleged sexual harassment incidents occurred before *March 1993* (Br. in Opp. 4), and that respondent's sexual harassment claim, dismissed by the district court as untimely (Pet. App. 72a), was reinstated by the court of appeals based on the continuing violation theory (*id.* at 28a).[3]

If respondent now wishes to waive claims that the court of appeals thought she was presenting and should be allowed to present, then petitioner of course has no objection. Nevertheless, it remains true that respondent is pursuing, and the court of appeals is allowing her to pursue, claims relating to incidents occurring on or after February 15, 1993, but before the 300-day period preceding the filing of her administrative complaint. Thus, the question presented by the petition remains in live dispute between the parties, as well as unsettled and important.

b. Respondent argues that the petition should be denied because it does not seek review of certain additional questions that were resolved by the court of appeals. Br. in Opp. I, 30. In her view, the Court should also be called upon to decide, among other issues, whether "discriminatory retaliation by coemployees may create vicarious liability for an employer that knowingly fails to abate it." *Ibid.* Respondent does not suggest, nor could she, that the Court must first resolve these other matters in order to reach the single question presented by

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[2] In addition, respondent concedes that, under the Ninth Circuit's approach to the continuing violation doctrine, she is entitled to present evidence regarding alleged acts of discrimination antedating the limitations period and to receive "relief for every act of groping tolerated by the employer." Br. in Opp. 9.

[3] Respondent also disputes that she asked United to prevent her alleged harasser, Chmelir, from bidding onto the same shifts that she was working. Br. in Opp. 5-6 (citing Pet. 5). According to respondent, she merely asked United to keep Chmelir away from her when the two were assigned to the same shift. Br. in Opp. 6. This factual controversy has no bearing on the question presented.

the petition. Although these additional questions may be of interest to respondent, the brief in opposition offers no reason why any of them merits review by this Court. Respondent does not assert that any of the issues are the subject of a circuit split, that the court below reached the wrong result as to one or more issues, or that any of the issues are important for some other reason.[4] Accordingly, respondent's additional questions need not be included in a grant of certiorari.

c. Respondent understandably attempts to defend the lower court's approach to the continuing violation doctrine. Br. in Opp. 8-25. A brief on the merits following a grant of certiorari, not a reply brief at the petition stage, is the proper place for an exhaustive rebuttal of respondent's arguments, but we note briefly some of the more obvious flaws in her position.

Section 706(e) is a statute of limitations, the essential purpose of which is to encourage the prompt filing of discrimination claims by foreclosing the prosecution of stale ones. See *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *Delaware State Coll.* v. *Ricks*, 449 U.S. 250, 256 (1980) (recognizing that Section 706(e) deliberately limits the "protection of the civil rights laws to those who promptly assert their rights"). The *Berry* test and the notice rule of the First and Seventh Circuits require employees to act with dispatch upon suffering what the employees perceive to be unlawful discrimination, while at the same time affording relief to those who, in the exercise of reasonable diligence, do not immediately appreciate the wrongful nature of the treatment they experience. By contrast, the Ninth Circuit's approach permits employees, like respondent here, to preserve discrimination claims indefinitely until it becomes convenient to sue on them. A natural consequence of this approach is to encourage putative victims to endure discriminatory treatment for as long as possible in order to enhance the prospect of a substantial

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[4] Respondent may, of course, brief any issue that was argued below and would support the judgment below, even if it was not the ground on which the court of appeals rested its decision. *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994). It does not appear, however, that any of respondents' proposed issues would "preserve, and not * * * change, the judgment." *Ibid.*

damages award. This result is contrary to the remedial purpose of Title VII, which seeks the swift elimination of discriminatory practices from the workplace. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

Respondent is also mistaken in her suggestion that this Court, like the court below, has allowed plaintiffs to obtain relief for time-barred acts of employment discrimination provided that the "last act" of unfair treatment falls within the limitations period. Br. in Opp. 9, 28-30. Respondent's reliance on this Court's discussion of the continuing violation doctrine in the antitrust context is particularly unavailing. The Court clarified in *Klehr* v. *A.O. Smith Corp.*, for example, that

> in the case of a "continuing violation," say a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, "each overt act that is part of the violation and that injures the plaintiff," *e. g.*, each sale to the plaintiff, "starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." But **the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.**

521 U.S. 179, 189 (1997) (citations omitted, emphasis added); see also *Rotella* v. *Wood*, 528 U.S. 549, 559 (2000) (emphasizing the public policy of "rewarding the swift" that underlies the Clayton Act's "accrual rule that 'generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business'"). The brief in opposition offers no policy reason why victims of employment discrimination should be allowed to recover for incidents that they knowingly failed to report to an administrative agency before the expiration of Title VII's limitations period.

Finally, the brief in opposition does not attempt to respond to our observation (Pet. 18, 20) that the continuing violation rule adopted by the court below is so indeterminate that it cannot be applied in a consistent manner. Under the lower court's approach, the district courts are vested with unlimited discretion to determine in individual cases which acts are "related closely enough" with respect to their subject matter and temporal proximity. The threshold of relatedness established by the court

of appeals, as exemplified by the case at bar, is a low one. Here, respondent was able to able to revive time-barred claims of sexual harassment involving a coworker by pointing to two discrete instances of alleged retaliation by her supervisor. In light of this result, it is difficult to imagine two separate acts of discrimination that the court of appeals would not find to be "related closely enough" for purposes of applying the continuing violation doctrine.[5] This boundless exception to Section 706(e) simply cannot be reconciled with the plain language of the statute, which defines the limitations period for Title VII claims "with precision." *Alexander*, 415 U.S. at 47.

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As this Court observed more than a century ago, statutes of limitations "are found and approved in all systems of enlightened jurisprudence." *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879). More recently, the Court recognized the important interests that are promoted by the limitations period incorporated into Title VII of the Civil Rights Act of 1964, including the importance of assuring repose when putative plaintiffs knowingly fail to assert their rights in a timely manner. See *Ricks*, 449 U.S. at 259. Yet the Ninth Circuit, in derogation of these principles, adopted a "continuing violation" exception to the Title VII limitations period that permits employees to resuscitate stale claims whenever the court deems them to be "related closely enough" to incidents within the limitations period. That formless exception is contrary to the text and purpose of Title VII, inconsistent with this Court's guidance regarding the interpretation of statutes of limitation, and at odds with every other circuit's approach to the continuing violation doctrine. Further review of the decision below is warranted.

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[5] Thus, although respondent is right (Br. in Opp. 7) that Judge Kleinfeld's dissent does not set out a legal framework comprehensively different from that of the court of appeals majority, the dissent nevertheless is instructive because it shows how out of step the result reached here – as well as the test applied, admittedly in conflict with the law of other circuits – is with this Court's jurisprudence.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted.

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